

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

J&J SPORTS PRODUCTIONS, INC.,)	Case No. 11-5448-SC
)	
Plaintiff,)	ORDER GRANTING IN PART
)	PLAINTIFF'S MOTION FOR
v.)	<u>DEFAULT JUDGMENT</u>
)	
GUILLERMINA VAZQUEZ and SALVADOR)	
VAZQUEZ, individually and d/b/a)	
BELMAR-LA GALLINITA MEAT MARKET,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is the Motion for Default Judgment brought by Plaintiff J & J Sports Productions ("Plaintiff") against Defendants Guillermina and Salvador Vazquez, individually and d/b/a Belmar-La Gallinita Meat Market (respectively, "Ms." or "Mr. Vazquez"; collectively, "Defendants").¹ ECF No. 19-1 ("Mot."). Plaintiff alleges, in short, that Defendants unlawfully exhibited at their business establishment a boxing match for which Plaintiff held exclusive commercial distribution rights. ECF No. 1 ("Compl.") at 1. Defendants have appeared through counsel and

¹ The Complaint erroneously names Salvador Vazquez as Salvador "Vaquez." ECF No. 1 ("Compl.") at 1. Many of Plaintiff's papers and, consequently, some court records contain this typographic error, which should be disregarded.

1 filed a brief in which they admit their default, as well as
 2 liability, but contest damages. ECF No. 22 ("Opp'n"). The Court
 3 finds the matter suitable for determination without oral argument.
 4 Civ. L.R. 7-1(b). For the reasons set forth below, the Court
 5 grants Plaintiff's Motion in part.² The Court will separately
 6 enter judgment in favor of Plaintiff and award damages in the
 7 amount of \$2,450.00.

8 9 **II. BACKGROUND**

10 The Court takes all of the factual allegations of the
 11 Complaint as true, except for those relating to damages. Geddes v.
 12 United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977). Because
 13 damages must be proven, the Court may consider evidence presented
 14 by the parties. See Fed. R. Civ. P. 55(b); Pope v. United States,
 15 323 U.S. 1, 12 (1944) ("It is a familiar practice . . . for a court
 16 upon default, by taking evidence when necessary . . ., to fix the
 17 amount which the plaintiff is lawfully entitled to recover and to
 18 give judgment accordingly."). Because Defendants admit liability
 19 and damages alone are at issue, the Court supplements the account
 20 contained in the Complaint with uncontested evidence relevant to
 21 the determination of damages.³

22
 23 ² As set forth in Section III infra, Plaintiff originally asserted
 four claims against Defendants but has since withdrawn two.

24 ³ In support of its Motion, Plaintiff submitted an affidavit from a
 25 private investigator, Tammy Joffe, who observed the accused
 26 activity at Defendants' establishment, as well as a declaration
 27 from its counsel, Thomas Riley. ECF Nos. 19-3 ("Joffe Aff."), 19-2
 ("Riley Decl."). Plaintiff also submitted the affidavit of Joseph
 28 M. Gagliardi, President of J & J Sports Productions. ECF No. 20
 ("Gagliardi Aff."). Much of Mr. Gagliardi's (obviously form)
 affidavit consists of either legal argument or opinion, both of
 which are inadmissible. Gagliardi Aff. ¶¶ 13-15, 18 (argument);
 16-17 (opinion); see also Flintkote Co. v. Gen. Acc. Assur. Co.,

On the night of Saturday, November 13, 2010, Manny Pacquiao fought Antonio Margarito for the WBC Light Middleweight boxing championship. See Compl. ¶ 10. The fight, along with undercard bouts, was televised nationwide via pay-per-view, under the title "Tactical Warfare" (herein, the "Program"). Id. Plaintiff is a sub-licensor of rights to exhibit pay-per-view fights like the Program in commercial establishments such as bars, restaurants, hotels, casinos, and racetracks. See id. ¶ 11. Plaintiff had such a sub-licensing arrangement for the Program. Id. Plaintiff bases the cost of the commercial sub-license on the size of the commercial establishment. Gagliardi Aff. Ex. 1. The least expensive sub-license covers establishments that hold zero to one hundred patrons and costs \$2,200.00. Id.

At about five o'clock on the day of the Pacquiao-Margarito bout, Mr. Vazquez left the establishment he co-owns with Ms. Vazquez, the Belmar-La Gallinita Meat Market, located at 2989 24th Street in San Francisco, California (the "establishment"). S. Vazquez Decl. ¶ 5.⁴ The establishment consists of three distinct rooms: a meat market and a convenience store, which are open only during the day, and a taqueria, which is open both day and night.

410 F. Supp. 2d 875, 885 (N.D. Cal. 2006) (disregarding legal argument and opinion). The Court disregards these portions of Mr. Gagliardi's affidavit.

⁴ Defendants filed three declarations with their opposition brief, those of Salvador Vazquez, Guillermina Vazquez, and Victor Jaramillo. ECF Nos. 22-1 ("S. Vazquez Decl."), 22-2 ("G. Vazquez Decl."), 22-3 ("Jaramillo Decl."). Four weeks later, after briefing closed, Defendants filed a fourth declaration, that of David Asencio. ECF No. 24 ("Asencio Decl."). Defendants' brief references Asencio's declaration and the record does not reflect why his declaration was not filed along with the others. Plaintiff objects to the late-filed declaration on a number of grounds. ECF No. 25 ("Obj'n"). Because the Court does not rely on the contested declaration, Plaintiff's Objection is OVERRULED as moot.

1 Id. ¶ 3; Joffe Aff. at 1. The taqueria occupies about 180 square
2 feet. S. Vazquez Decl. ¶ 3. When Mr. Vazquez left work, he locked
3 up the meat market and convenience store, and entrusted the
4 taqueria to two employees. Id. ¶ 5. Ms. Vazquez was not at work
5 at the establishment that evening. G. Vazquez Decl. ¶ 4.

6 One of the employees working at the taqueria that night, David
7 Jaramillo, had a brother, Victor. See Jaramillo Decl. ¶ 5. Victor
8 lived in a room above the establishment. Id. ¶ 3. Victor decided
9 he would like to watch the fight with his brother, so he ordered it
10 through his DirecTV satellite account, which was licensed for
11 residential use only. Id. ¶¶ 4-5. Victor then took his television
12 downstairs to the taqueria, put it on top of a refrigerator, and
13 connected his DirecTV service to the television. Id. ¶ 5. Neither
14 Victor nor anyone else asked Mr. or Ms. Vazquez for permission to
15 view the Program in the establishment. Id. ¶ 6; S. Vazquez ¶ 6; G.
16 Vazquez ¶ 5. Victor declares that he did not know he was breaking
17 the law when he exhibited the Program. Jaramillo Decl. ¶¶ 6, 9.

18 At about 9:25 p.m., a private investigator approached the
19 taqueria. Joffe Aff. at 1. The investigator observed a crowd
20 gathered on the sidewalk outside. Id. As she entered the
21 taqueria, she was not asked to pay a cover charge. Id. Inside,
22 she saw that the establishment was crowded. Id. There was only
23 one table, and no seats were available. Id. She bought a bottle
24 of soda for a dollar-fifty, and conducted a series of headcounts:
25 there were either 32 or 33 people inside, though the room was only
26 supposed to hold about 25 people. See id. She observed the
27 Program being televised on a single "small, box-style TV,
28 approximately 20 [inches], positioned up above the refrigerator

1 case." Id. She noted the color of the fighters' trunks, and that
2 Pacquiao was "dominat[ing] the action in the tenth round." Id. By
3 9:35 p.m., about ten minutes after she'd arrived, the investigator
4 left. Id. at 2.

5 On November 9, 2011, relying on the information contained in
6 the private investigator's report, Plaintiff filed its Complaint.
7 See Compl. Plaintiff alleges that it owned exclusive commercial
8 distribution rights for the Program, and that Defendants did not
9 purchase the commercial license required to exhibit the Program
10 lawfully. Compl. ¶¶ 10-13. Plaintiff asserts four claims against
11 Defendants: (1) violation of the Federal Communications Act of
12 1934, 47 U.S.C. § 605 ("Communications Act"), which prohibits the
13 unauthorized publication or use of wire or radio transmissions; (2)
14 violation of 47 U.S.C. § 553, which prohibits unauthorized
15 reception of cable service; (3) common-law conversion; and (4)
16 violation of California's Unfair Competition Law, California
17 Business and Professions Code § 17200 et seq. ("UCL"). The
18 Complaint prays for: statutory damages totaling \$170,000;
19 compensatory, exemplary, and punitive damages under the conversion
20 claim; declaratory and injunctive relief, as well as restitution,
21 under the UCL; and attorney fees and costs under each of its
22 claims. Compl. at 8-9. As discussed infra, Plaintiff has
23 abandoned its request for some of this relief.

24 On January 17, 2012, Plaintiff caused Mr. Vazquez to be served
25 by personal service. ECF No. 11. On January 25, Plaintiff
26 effected substitute service on Ms. Vazquez at Defendants' business
27 address. ECF No. 13. Defendants do not challenge service.

28 On February 22, Plaintiff moved for entry of default against

Mr. Vazquez. ECF No. 12. On February 24, the Clerk entered default against him. ECF No. 14. On March 1, Plaintiff moved for entry of default against Ms. Vazquez. ECF No. 15. On March 2, the Clerk entered default against her. ECF No. 16. On March 7, counsel for Defendants entered an appearance. ECF No. 17.

On April 2, Plaintiff filed the instant Motion. On April 6, at a previously scheduled status conference, counsel for Defendants requested and received leave from the Court to file a response to Plaintiff's Motion. ECF No. 21. Defendants filed the Opposition and supporting declarations on April 16. On April 23, Plaintiff filed its reply brief. ECF No. 23 ("Reply").

III. DISCUSSION

Plaintiff's Complaint asserts four claims, but since filing its initial pleading Plaintiff has modified its demands and now seeks relief only under its § 605 and conversion claims. Specifically, Plaintiff seeks damages in the amount of \$110,000.00 under § 605 and, under their conversion claim, \$2,200.00 -- the cost of a commercial license for a venue the size of the taqueria. Riley Decl. ¶¶ 6-7. The Court determines that Plaintiff has abandoned its claims under § 553 and the UCL, and DISMISSES those claims without prejudice.⁵

⁵ Plaintiff's abandonment of its § 553 claim is especially appropriate in light of the facts of this case. "A signal pirate violates section 553 if he intercepts a cable signal, he violates section 605 if he intercepts a satellite broadcast. But he cannot violate both by a single act of interception." J & J Sports Productions, Inc. v. Manzano, C-08-01872 RMW, 2008 WL 4542962, at *2 (N.D. Cal. Sept. 29, 2008). It is uncontroverted that the Program aired at Defendants' establishment through a DirecTV satellite broadcast. Accordingly, on the facts of this case, Plaintiff could bring only a § 605 claim.

1 With respect to the remaining claims, the parties' positions
2 may be summarized as follows: Defendants admit liability but urge
3 the Court to impose only minimal damages, while Plaintiff seeks
4 maximal damages to deter signal piracy. The Court concludes that
5 Plaintiff's prayer for damages with respect to § 605 overreaches,
6 but that Plaintiff is entitled to the relief it seeks on its
7 conversion claim.

8 Before moving to the substance of the issues, however, the
9 Court addresses a preliminary matter raised by Plaintiff.
10 Plaintiff argues that, because Defendants have defaulted, they have
11 no right to present evidence on the issue of damages. Reply at 2.
12 The Court disagrees. First, Plaintiff's position is in obvious
13 tension with Federal Rule of Civil Procedure 55. Rule 55 permits a
14 court weighing the entry of a default judgment to take evidence to
15 determine the amount of damages, without placing limits on how or
16 from whom. See Fed. R. Civ. P. 55(c); cf. Adriana Int'l Corp. v.
17 Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990) ("default judgment
18 generally precludes a trial of the facts except as to damages").

19 Second, Plaintiff's position is unsupported by persuasive
20 authority. The two cases cited by Plaintiff are inapposite. The
21 first, Cohen, concerned a defendant who attempted to file an answer
22 after entry of default. See Cohen v. Murphy, C 03-05793 HRL, 2004
23 WL 2779942 (N.D. Cal. Apr. 20, 2004). The three-paragraph opinion
24 in Cohen, which cites no authority except a Fourth Circuit decision
25 from 1927 and an Illinois district court case, stands for nothing
26 more than the uncontroversial proposition that a defendant may not
27 file an answer, that is, a pleading, after entry of default -- an
28 issue which is wholly distinct from presenting evidence of damages.

1 The other case cited by Plaintiff, Great American, is similarly
2 unpersuasive. Great Am. Ins. Co. v. M.J. Menefee Const., Inc.,
3 F06-0392 AWIDLB, 2006 WL 2522408 (E.D. Cal. Aug. 29, 2006). Like
4 Cohen, Great American addresses an issue not presented here, the
5 timeliness of the filing of a pleading, this time a counterclaim.
6 Id. at *2. The court in that case cited only Cohen, the same
7 Fourth Circuit opinion cited in Cohen, and district court opinions
8 from outside this circuit. Id. These authorities are
9 unpersuasive.

10 Because Plaintiff has presented no persuasive reason to
11 disregard Defendants' damages evidence, the Court takes it into
12 account as it proceeds to the substance of Plaintiff's claims.

13 **A. Section 605**

14 The Communications Act provides, in pertinent part, that "[n]o
15 person not being authorized by the sender shall intercept any radio
16 communication and divulge or publish the existence, contents,
17 substance, purport, effect or meaning of such intercepted
18 communication to any person." 47 U.S.C. § 605(a). The
19 Communications Act provides a private right of action to persons
20 "aggrieved" by violations of the act. Id. § 605(e)(3)(A). A
21 "person aggrieved" includes a party "with proprietary rights in the
22 intercepted communication by wire or radio, including wholesale or
23 retail distributors of satellite cable programming." 47 U.S.C. §
24 605(d)(6). Here, Plaintiff alleges that it had exclusive
25 commercial licensing rights for the Program. Compl. ¶ 10. Thus,
26 Plaintiff is an aggrieved person for purposes of the statute.
27 Plaintiff further alleges that Defendants were not authorized to
28 intercept and exhibit the Program, yet did so. Id. ¶ 13.

1 Defendants admit that the Program was unlawfully exhibited in their
2 establishment through a non-commercial DirecTV satellite
3 transmission, Opp'n at 3, and satellite television signals are
4 among the communications protected by § 605, DirecTV, Inc. v. Webb,
5 545 F.3d 837, 844 (9th Cir. 2008). Hence, Plaintiff has made out a
6 prima facie case for Defendants' liability under § 605(a).
7 Defendants do not contest liability.⁶

8 The central issue, then, is how much Plaintiff is entitled to
9 in damages. Section 605(e)(3)(C) sets forth the damages available
10 in a civil action brought by an aggrieved person such as Plaintiff.
11 Initially, an aggrieved person must elect to seek either actual or
12 statutory damages. 47 U.S.C. § 605(e)(3)(C)(i). Plaintiff has
13 opted for statutory damages. See Compl. ¶ 18. Statutory damages
14 may be awarded for each violation "in a sum of not less than \$1,000
15 or more than \$10,000, as the court considers just." 47 U.S.C. §
16 605(e)(3)(C)(i)(II).

17 This is not the end of the matter. Upon certain factual
18 findings, § 605(e)(3)(C) allows both upward and downward departures
19 from the standard range of damages. The statute provides for
20 enhanced damages in the amount of up to \$100,000 per violation if
21 "the court finds that the violation was committed willfully and for
22 purposes of direct or indirect commercial advantage or private
23 financial gain." 47 U.S.C. § 605(e)(3)(C)(ii). The statute also
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25 ⁶ This finding assumes that Defendants are liable under § 605
26 simply by virtue of the Program having been exhibited in their
27 establishment by a third-party non-employee (Victor Jaramillo),
28 without Defendants' knowledge and when Defendants themselves were
not present, but while their employees (David Jaramillo and David
Asencio) were present and did nothing to prevent the Program from
being shown. See Opp'n at 2-3. No party has asked the Court to
test this assumption, so the Court does not.

1 provides for reduced damages of "not less than \$250" if "the court
2 finds that the violator was not aware and had no reason to believe
3 that his acts constituted a violation of" § 605. Id. §
4 605(e)(3)(C)(iii). Plaintiff urges the Court to impose the maximum
5 allowable amount of both regular and enhanced damages, totaling
6 \$110,000. Riley Decl. ¶¶ 6-7. Defendants argue for the minimal
7 allowable amount of reduced damages, totaling \$250. Opp'n at 6.

8 Plaintiff has not shown that it is entitled to enhanced
9 damages under § 605(e)(3)(C)(ii). On the uncontested facts before
10 it, the Court sees no evidence that Defendants exhibited the
11 Program either willfully or for commercial or personal advantage.
12 Defendants required no cover charge to enter the establishment on
13 the night in question. Mr. Vazquez, who does the books for the
14 establishment, declares that the receipts from that night were
15 consistent with the taqueria's regular prices, suggesting that
16 Defendants did not use the Program to charge a premium. S. Vazquez
17 Decl. ¶ 7. There is no claim that Defendants ever advertised or
18 promoted the exhibition of the Program at their establishment, or
19 even that Defendants knew in advance that it would be shown there.
20 Defendants, after all, were not present at the time the Program was
21 shown at their establishment, and it is uncontested that no one
22 ever asked them for their permission to do so. The Court does not
23 see how Defendants could engage in willful infringement through
24 acts they knew nothing about. For the same reasons, the Court
25 would be hard-pressed to find that the Defendants harbored any
26 "purpose" of furthering a commercial advantage or reaping private
27 gain through acts of which they were wholly ignorant. The Court
28 declines to award enhanced damages under § 605(e)(3)(C)(ii).

1 The next question is whether Defendants can justify a downward
2 departure from the Communications Act's usual damages range. To do
3 so, Defendants must establish that they were "not aware" and "had
4 no reason to believe" that the infringing acts violated the law.
5 47 U.S.C. § 605(e)(3)(C)(iii). The Court has already found that
6 Defendants did not know what was going on in the establishment on
7 the night of the bout, that is, that they were "not aware" of the
8 infringing activity, let alone that it amounted to a violation of
9 the law. The Court also finds, for the same reason, that they had
10 "no reason to believe" that the infringing activity violated the
11 law, for the simple reason that they did not know it was occurring.
12 These facts, combined with the absence of any exacerbating
13 circumstances, lead the Court to determine that reduced damages are
14 justified in this case.

15 Plaintiff argues that reduced damages are inappropriate in
16 light of the policy of signal piracy deterrence embodied in the
17 statute. Mot. at 19. Plaintiff even goes so far as to say that
18 low damages awards by district courts are "a major reason why there
19 [has] been little to no decrease in piracy." Id. Plaintiff
20 insists that "Defendant[s] must be held accountable for a
21 substantial amount above the market value of the sublicense fee to
22 broadcast the Program," lest a perverse incentive to violate the
23 law arise. Id.

24 Plaintiff's theory as to the root causes of signal piracy may
25 or may not be true. If Congress finds it is true, Congress may
26 amend the Communications Act consistent with its view of what will
27 best effectuate its policies. Meanwhile, as written, the
28 Communications Act expressly contemplates leniency for unwitting

1 violators -- which suggests that Congress has balanced its policy
2 of deterrence against other values. Because Defendants satisfy the
3 statutory criteria for reduced damages, and, more than that,
4 Defendants appear to have had no idea that their establishment was
5 being used to violate § 605, the Court believes this to be a
6 paradigmatic case for reduced damages. Things would be different
7 if Defendants had violated the law previously -- repeat offenses
8 could and should weigh heavily toward a finding of willful
9 infringement -- but Plaintiff does not claim that Defendants are
10 repeat offenders.

11 Pursuant to the statutory criteria, the Court AWARDS Plaintiff
12 reduced damages of \$250 for Defendants' admitted but unwitting
13 violation of § 605.

14 **B. Conversion**

15 As a preliminary matter, the Court notes that while Plaintiff
16 invokes only the Court's federal-question jurisdiction under 28
17 U.S.C. § 1331, see Compl. ¶¶ 1-3, in order to decide Plaintiff's
18 conversion claim (or the abandoned UCL claim) it would have to
19 assert supplemental jurisdiction under 28 U.S.C. § 1367(a). "A
20 federal district court with power to hear state law claims has
21 discretion to keep, or decline to keep, them under the conditions
22 set out in 28 U.S.C. § 1367(c)." Long v. City & Cnty. of Honolulu,
23 511 F.3d 901, 907 (9th Cir. 2007). The Court determines that
24 asserting supplemental jurisdiction over Plaintiff's conversion
25 claim is appropriate here because: the Court is satisfied that it
26 has jurisdiction over Plaintiff's federal statutory claims; the
27 conversion claim is based on the same allegations; and none of the
28

factors enumerated in 28 U.S.C. § 1367(c) are present.⁷ A federal court exercising supplemental jurisdiction over a claim applies the law of its forum state to that claim. Bass v. First Pac. Networks, Inc., 219 F.3d 1052, 1055 n.2 (9th Cir. 2000). Because this Court sits in California, it applies California's law of conversion.

"Under California law, conversion has three elements: (1) ownership or right to possession of property; (2) wrongful disposition of the property right of another; and (3) damages." J & J Sports Productions v. Coyne, --- F. Supp. 2d ---, C 10-04206 CRB, 2012 WL 761688, at *7 (N.D. Cal. Mar. 7, 2012) (citing G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv. Inc., 958 F.2d 896, 906 (9th Cir. 1992)). Although conversion generally applies to tangible property, intangible property such as the exclusive distribution rights over a program may be capable of being converted. Id. (citing Don King Prods./Kingvision v. Lovato, 911 F. Supp. 419, 423 (N.D. Cal. 1995)). California law provides that damages for conversion are based on the value of the property at the time of the conversion. Krueger v. Bank of Am., 145 Cal. App. 3d 204, 215 (1983).

In this case, Plaintiff has alleged its ownership over the commercial distribution rights to the Program. Compl. ¶ 10. It alleges that Defendants showed the Program at their establishment in contravention of Plaintiff's exclusive commercial distribution

⁷ Section 1367(c) permits a district court to decline supplemental jurisdiction over a claim "if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c).

1 rights. Id. ¶ 13. And Plaintiff has alleged damages, in the form
2 of the commercial license fee that Defendants should have paid.
3 Id. ¶ 26. Plaintiff therefore makes out a prima facie case of
4 conversion. Defendants do not contest liability and, with respect
5 to the conversion claim, they appear to concede damages as well.
6 Opp'n at 2 (acknowledging that California statutorily limits
7 damages for conversion to the value of the thing converted). The
8 commercial license would have cost Defendants \$2,200.00, Gagliardi
9 Aff. ¶ 8, and Plaintiff does not seek more than that, Riley Decl.
10 ¶¶ 5-6. The Court therefore GRANTS Plaintiff's Motion for Default
11 Judgment with respect to its conversion claim and awards Plaintiff
12 \$2,200.00 in compensatory damages.

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1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court GRANTS Plaintiff's
3 Motion for Default Judgment with respect to its § 605 and
4 conversion claims. As to Plaintiff's § 605 and conversion claims,
5 the Court will enter Judgment separately in favor of Plaintiffs and
6 AWARD Plaintiff \$250.00 in statutory damages for its § 605 claim
7 and \$2,200.00 for its common law conversion claim, for a total of
8 \$2,450.00 in damages. The Court awards no other relief. The Court
9 does not enter judgment with respect to Plaintiff's claims for
10 violations of 47 U.S.C. § 553 and Cal. Bus. & Prof. Code § 17200 et
11 seq., which Plaintiff has withdrawn.

12
13 IT IS SO ORDERED.

14
15 Dated: July 24, 2012

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UNITED STATES DISTRICT JUDGE